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Subject final soils letter to Toby

UDEQ is signing this today. The final version is attached. Thanks for everyone's help in putting the letter together.



responsetotoby.wpd



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Ref: 8EPR-SR

Mr. Toby Ross
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Dear Toby:

Thank you for your September 25 letter detailing Park City's concerns regarding the proposed soil ordinance work group. EPA respects the sensitivity and difficulty of this issue and we hope the information provided gives Park City the level of comfort and understanding needed to move forward with this important work. This letter is offered as a joint response from EPA and the Utah Department of Environmental Quality (UDEQ).

Your letter raises several specific issues and questions regarding EPA and UDEQ's positions on the Park City Maintenance of Soil Cover and Landscaping Ordinance (the "Ordinance"). A response to each is provided below. We have targeted our responses only to the soils ordinance workgroup and the Prospector Square area, and have not addressed other soils issues in the Park City area. We feel these issues have many similarities, but cannot be resolved until we have a clear picture of how we will deal with the Ordinance and the original Prospector area. We also hope that by confronting the difficult issues of the Ordinance area first, we will strengthen a productive working relationship with Park City and other stakeholders and enable us all to move forward together on other issues in the future.

1. Do earlier expressions of concern by the regulators reflect current issues and expectations?

Yes. Since beginning discussions on the watershed investigation in early 1999, our concerns on the Ordinance and related soils issues have changed little, if any. The various documents which

chronicle our recent work to date (public meeting transcript, stakeholder meeting minutes, issue sheets, media articles, etc.) show that our message has been extremely consistent. However, as our knowledge of the facts has increased, there may have been minor refinements in our assessment of the situation. It is also possible that as we have moved through this watershed investigation, we have made misstatements or have been misunderstood.

2. Park City requests that the regulatory agencies adopt a posture of ownership and responsibility for the future success of the Ordinance.

It is our goal to strive toward both ownership and responsibility for the Ordinance's success. When the Ordinance was proposed to EPA, it was clear that the level of cooperation between EPA, Park City, and UDEQ was low. It was not EPA's or UDEQ's preference to move forward with a local ordinance, nor was the Ordinance put forth using any EPA authority or regulatory-based process to determine the best method of response. Because of this, we never had an opportunity to fully explore the environmental, financial, implementation, and long-term maintenance issues of various solutions. The Ordinance was *proposed to us* by Park City; to my knowledge it was not something we suggested or worked closely with Park City to develop. We questioned at the time, and still question, if the Ordinance was the best way to remedy the situation at Prospector. However, given the very difficult situation and the fact that Park City felt the Ordinance was the best solution available, EPA had little alternative but to work with Park City to jointly reach a resolution. In essence, though the Ordinance may have not been the best solution in our view, it was a solution that appeared to have community support and it did serve to address the possibility of environmental exposures. It is now the situation we will deal with.

While EPA acknowledged that the requirements of the Ordinance, *if complied with*, would mitigate environmental exposures, at no time did we give unlimited endorsement of the Ordinance. Institutional controls, like the Ordinance, are generally not EPA's favored response method for circumstances such as these. Whenever you leave waste in place, there are long-term issues such as compliance, maintenance, and periodic review which must be dealt with. In residential/multi-property situations such as Prospector, we have found these issues are exceptionally difficult to manage. These issues were never explored with regards to the Ordinance, and it is these issues we wish to address. If addressed to our satisfaction, we will be able to adopt a posture of ownership and responsibility for the Ordinance within the limits of our authority.

3. EPA has held out "regulatory closure" to the City and to the homeowners in the Prospector neighborhoods. What is the status of the law and regulations under CERCLA regarding regulatory closure? Are there any precedents for regulatory closure at a site such as Prospector? Has EPA ever

“closed the books” in such a context? What are the specific criteria for closure in Prospector? Do EPA and UDEQ have any standards, criteria, interests, goals, or motivations regarding regulatory closure?

First, the notion that EPA “held out” regulatory closure seems to imply it was used as a ploy. We frequently used the word “closure” because it was the word used and most understood by many residents. We did not think internally-used EPA terminology such as “no further remedial action planned” or “archived from CERCLIS” would be as understandable.

There are many ways to achieve “closure” under CERCLA, each with varying degrees of future regulatory involvement. To go into every detail would be difficult, so discussion will be limited to two basic premises for sites that are already included on CERCLIS, the official tracking system of actual or potential Superfund sites:

- If a site is investigated and found not to meet the requirements for inclusion on the National Priorities List (NPL) or not to pose any unacceptable risk, a site can be given a “No further remedial action planned” designation and “archived” from the CERCLIS database. In this case, no further Superfund involvement would occur unless conditions changed or additional information became available that indicated unacceptable risk was possible. These sites may also be referred to another program (such as RCRA or the State Voluntary Cleanup Program) if warranted.
- If a site is found to meet the requirements for inclusion on the NPL, EPA can propose the site at its discretion. Once a site is proposed or final on the NPL, and the investigation and cleanup process under CERCLA and the National Contingency Plan (NCP) have run their course, “closure” generally means removal from the proposed or final NPL and legal agreements with any responsible party. The site may or may not be archived from CERCLIS - there may be ongoing maintenance or review requirements which require some Superfund involvement or coordination. If a site is deemed to present unacceptable risk but is not proposed for the NPL, there are other cleanup processes available which may result in archival from CERCLIS.

Hundreds of sites nationally have achieved “closure” in one of those two basic forms. However, the degree of “closure” differs from site to site. Here are some examples:

- If site information shows no contamination is present, archiving it from CERCLIS would mean the end of Superfund involvement.
- If a site has some contamination, but there is no exposure or unacceptable risk from the contamination, a site may be archived. It may be reopened later if the potential for exposure changes (i.e. new development attracts people to the site or significant changes in standards or science occur which cause us to reevaluate our decision).

- If a site is cleaned up and all contamination is removed, little, if any, future Superfund involvement will be required.
- If a site is cleaned up but some contamination remains on site, some future Superfund involvement may be required in the form of reviews or maintenance.

Lastly, it is important to note that EPA never relinquishes its ability to act should unacceptable risk or other unknown conditions arise.

The Silver Creek Tailings Site (aka Prospector Square) is somewhat unique in that it: (1) met the criteria for proposal to the NPL, (2) was removed from NPL consideration *not* through use of EPA response action but through congressional action, (3) is exempted from future NPL listing unless significant, new information comes to light, and (4) is still listed on the CERCLIS database with some outstanding issues which we feel prevent archiving. Nonetheless, the situation at Prospector is not one without parallel. In EPA's view, Prospector is similar to the many sites which are on CERCLIS, but not on the NPL, and have some degree of contamination. If it is shown to EPA's satisfaction that the site is not presenting, and will not present, any unacceptable risk, we will archive it from our CERCLIS database.

Risks from lead in residential soils is a very difficult topic. EPA has dealt with the question of mitigating exposure to contaminated residential soil in many ways. We generally prefer to remove the upper layer of contaminated soil where exposure most often occurs, but sometimes this is not practical or necessary. An example of this, and the most appropriate precedent, is the Smuggler Mine in Aspen, Colorado. Lead was present in soils of a residential area of Aspen. EPA proposed and finalized the site on the NPL in the late 1980s and later proposed substantial soil removal. Local residents, much like Park City, strongly opposed the listing and cleanup and doubted any appreciable health affects. After considerable debate, EPA and other stakeholders agreed to the formation of an external advisory panel to collect and analyze scientific data. Following this data collection and analysis, the panel made recommendations to EPA that no further cleanup action was necessary. EPA accepted these recommendations, and removed the site from the NPL in 1999 with no significant cleanup occurring. While there was significant opposition and animosity in the early phases, the end result showed that stakeholders can work together to provide EPA sufficient information to remove a site from the NPL. We believe that if the Smuggler Mine data had suggested something different, a more aggressive approach would have been taken in a cooperative fashion. We envision a similar process for Park City where the stakeholders work together to identify the issues and potential solutions.

Every site is unique and we try to ensure each decision we make reflects those unique characteristics. Smuggler was substantially different than Prospector, but it had the same criteria for closure: reasonable assurance that unacceptable risk to human health or the environment is not, and will not, be caused by contamination at the Site. As we have stated many times before, there are many ways to meet that criteria. Each has advantages and disadvantages and may be

suited to a particular site or circumstance. We think of it as a weight of evidence approach - each bit of information adds value and hopefully the sum makes it clear what direction to take. One tries to design a data collection/evaluation process which will increase the likelihood for sufficient evidence. However, this must always be balanced against factors such as cost, public acceptance, and available knowledge. We hope to work through these decisions with the working group.

For the evaluation of the Ordinance, EPA and UDEQ do not have a premeditated process, solution, or assured outcome. It will be a challenge to determine the best way to proceed and we want to work with the citizens and government of Park City to meet that challenge. We will not dictate which direction to go, but will advocate strongly for what we feel is appropriate. Our basic interest is ensuring that the Ordinance is doing its job and will continue to in the future. If it is not, then we want to work with the stakeholders to address it. We want to make the outcome something everyone, especially the residents, can live with. We receive no special credit or consideration for either achieving closure or failing to achieve closure on this site. There is no EPA agenda to undertake this work - if it is not supported by a majority of the local citizenry, then we will leave the situation as is. There is no "magic number" or numerical standard which we can provide you which makes the situation simple. What we can say is that members of both agencies who are familiar with the site sincerely hope the site is presenting no unacceptable risk and that we can reach an agreement that addresses everyone's concerns.

4. EPA has indicated an interest in conducting environmental studies in Park City. Park City is concerned about the very real prospect of significant economic stigma associated with such environmental studies, and skeptical of the value of the information such studies may produce. Park City is also concerned about how environmental studies will be financed. Park City is interested in knowing the regulatory options which are available under the particular circumstances in Prospector.

EPA respects that sometimes our investigations are accompanied by a degree of stigma and public concern. We have committed to taking practical steps to minimize concern in Park City, such as limiting the use of Superfund, and will continue to work with the stakeholders to do that.

However, we have a slightly different conception about stigma than Park City officials. Stigma was a particular concern during the 1980's when EPA and Superfund were a mystery to the general public and Superfund was popularly associated with sites such as Love Canal. However, in the 1990s, most people have become far more familiar with EPA and Superfund. Most are aware that nearly all former mining towns have some environmental issues to deal with - this isn't a scourge but a fact of life. Most are willing to accept those issues for the quality of life found in these special communities. In fact, locations which proactively engage their environmental issues are considered attractive places to live simply for that reason. In that

regard, Park City is no different than Aspen, Breckenridge, Vail, Telluride, Leadville, and a host of other small western ski towns affected by historic mining and host to various EPA activities.

We believe that *controversy* creates stigma. *Controversy* creates media interest. When government agencies are in agreement, people generally aren't as concerned, even when the issue is a seemingly difficult one. However, throughout the first year of this watershed work, Park City has offered only limited, qualified acceptance of the watershed process and EPA. We understand this view, particularly in light of EPA's past involvement in Park City. To this point that has been enough. However, if Park City's goal is closure, limited publicity, and reduced stigma, then we believe the best approach is to simply acknowledge that there are environmental issues to be dealt with, embrace a cooperative partnership with EPA, and offer positive, public support of the work we propose *together*. This can be done without relinquishing any of Park City's authorities or prerogatives. EPA has stated from the beginning that all of the watershed work, including work at Prospector, can be presented in a positive, non-alarmist fashion. We have not sought publicity other than to ensure public awareness and to offer support for the stakeholder group's work.

The group's work to date illustrates this point. We have involved the public and provided nearly unlimited access to information, yet public comment has remained relatively low. We wish to continue and strengthen this approach as we take on more difficult issues.

Being skeptical about environmental studies can be a healthy position. Some skepticism ensures that data collection will be well planned and scrutinized. We welcome this scrutiny. On the other hand, skepticism is often caused by false expectations of what environmental data can produce and often is used to argue against doing *any* investigation. Environmental science is not exact and collection of data often leads to additional questions. If people expect a single sampling event or environmental study to give all the answers, or the answers from an event can be interpreted differently, many times they end up disappointed and resistant to any future investigation. We do not want this type of skepticism to discourage us from collecting data on this issue. EPA believes that well planned studies can provide significant information for this process and that different types of studies should be discussed.

Financing environmental studies is not too complex an issue. But, as you are aware, limiting the use of Superfund also limits the supply of money available through the Superfund program. In this light, we sincerely commend both Park City and United Park City Mines for contributing significant resources to the watershed effort. Without your contributions, this watershed work would not be possible.

EPA does not have an unlimited budget. During these comparatively lean times, our Superfund resources are focused on NPL sites. However, significant non-NPL work also receives our attention. Park City is an example. The Prospector Site was effectively exempted from NPL listing, which by law precludes us from spending Superfund dollars for non-emergency physical

cleanup work. It does not preclude us from spending dollars for investigation, either directly or through UDEQ, similar to any other site we are assessing. The priority for funding investigative work on this site *may* be lower than other actual or potential NPL sites - it depends on funding in a particular fiscal year. We cannot make any guarantees about funding but anticipate that EPA will provide the needed financial support for this effort. As any scope of work and timetable becomes clearer, we will be in a better position to evaluate financial concerns. As always, we would strongly support and encourage joint funding or contribution of resources. Lastly, we formally closed out cost recovery efforts for the Prospector Site several years ago and, unless the situation changes considerably, will not be attempting to recover any costs associated with past or future non-NPL work.

Our regulatory options for addressing Prospector are very limited, but as far as future investigation, no specific option is necessary. We are already "assessing" the site under Superfund and this will facilitate future investigation and possible archival from CERCLIS. However, to conduct actual cleanup work (if needed), determine the best method of response (if needed), or to help finance response actions of any kind, the only Federal regulatory option we are aware of which fits Prospector would be the use of Superfund Remedial Authority - the NPL process. This would be difficult for a variety of reasons, among them the Prospector NPL "exemption" in the 1986 Superfund Amendments and Reauthorization Act. The exemption reads "(the Silver Creek Tailings Site) shall be deemed removed from the list of sites recommended from inclusion on the NPL, unless (EPA) determines upon site data not used in the proposed listing of such (site), that the facility meets requirements of the Hazard Ranking System." This "new information" clause is open to interpretation, but in our minds would mean finding a clear health issue or a serious failure or abandonment of the Ordinance. So, unless the situation changes considerably, we are not considering the NPL process as a viable option and must assume any future work regarding the Ordinance will be done at the local level.

It is unfortunate, but due to past events at Prospector, neither EPA or UDEQ can assume regulatory responsibility for the Ordinance. When Park City resisted NPL listing and adopted the Ordinance, they assumed a great deal of responsibility and expense. We will attempt to work with Park City to meet our fundamental concerns through this informal watershed work, and hope to offer written support and archival from CERCLIS at the conclusion.

5. What studies will EPA and UDEQ be proposing to the group? Will EPA and UDEQ be making any specific proposals to the work group regarding proposed changes to the soils ordinance and if so what are they?

We have discussed this issue numerous times, and EPA has been queried by the media on this issue many times. The studies and "changes" we will propose and discuss are in response to the issues which EPA has communicated in written form to the stakeholders group (Park City

Landscaping Ordinance/Metals in Soils Investigation, EPA/UDEQ Issue Sheet, December 1999). We will not reiterate those here. Again, we do not wish to identify a “make or break” proposal, but would rather discuss several options and work with the *group* and community on choosing the best one(s). We cannot and will not dictate to Park City what to do with the Ordinance. We are open to suggestions and encourage all stakeholders to offer ideas and discussion. There are a variety of ways to get at the information we need, each with different risks, requirements, and likelihood of success.

Our information needs on the original Ordinance area can be placed into three categories: (1) evaluation of effectiveness, (2) full compliance, and (3) long-term maintenance. Each is discussed below.

(1) *Evaluation of effectiveness.* The Ordinance has been in place at Prospector for well over a decade. No formal review or analysis of field data (rather than administrative) has occurred. While it appears that there are no health issues, there is no data to support (or refute) this. When EPA conducts an NPL cleanup, we are required to perform five year reviews at sites where some contamination remains in place to ensure conditions have not changed and that the remedy is functioning as intended. We believe a similar evaluation of Prospector is needed, especially given the relatively thin six inch soil cover.

There are a variety of ways to obtain information regarding the effectiveness of the Ordinance. Each has specific considerations of difficulty, cost, and public acceptance which are not discussed here. Again, a weight of evidence approach is recommended, with possible inputs including:

Measuring Receptors (Children)

- *Analysis of existing health data.* Some blood lead data may be readily available from local residents and physicians. However, there are limitations to this data. These limitations may include quantity, quality, availability, and statistical problems. For instance, parents who test their children for blood lead are the ones who are most protective and would most likely be very careful to avoid exposure - skewing the results to one subset of the population. It is unclear what we would get from pursuing this information, but it is unlikely it would be sufficient to draw conclusions. It may be a good first step.
- *A well-designed, multi-seasonal blood lead study.* While there are limitations to what a blood lead study can provide, it is probably the best single source of current conditions we have available. It also directly measures the population at risk rather than speculating through models or other measurements. Such a study is usually performed with co-located environmental samples (soil, dust, tap water) to aid in correlation of biological data with environmental data. This type of study was performed at the Smuggler Mine Site in Aspen and was the primary piece of evidence used to support a “no action” remedy and closure. A

similar study was recently used in Midvale, Utah. Significant advances in study design and analysis have been made since the 1980s.

Measuring the Pathway (Soils)

- *Collection of "field" data to investigate the condition of the cap across the site.* If the six inch cap is still sound and this can be demonstrated through sampling, the pathway from the source to the receptor is broken and no significant exposure is occurring. This was the intent of the Ordinance. However, taken alone, there are limitations to this approach - data will likely not be obvious. Some failure of the cap may not translate into significant exposure.
- *Collection of "field" data to facilitate a risk assessment.* Additional information can be sought on current concentrations of contaminants in surface and subsurface soils, as well as the site-specific properties of the contamination itself. This information could be used with approved EPA risk models to determine if excessive risk is possible. However, certain aspects of EPA lead risk models are regarded by some parties outside the Agency as controversial and some feel they are over-conservative regarding mine waste sites.

Again, a weight-of-evidence approach is recommended, with all or some of those inputs considered either up front or successively. Our preference at this point is to collect as much existing information as possible and supplement this with a well-designed blood lead/co-located environmental sample study and limited field sampling of the cap. Any biological sampling or sampling of private property would not be mandatory. In coordination with stakeholders, we would actively solicit volunteers, perhaps providing financial incentives, and use a very positive message. In the end, the more data we have the better position we are in to make sound conclusions.

(2) *Full Compliance.* The Ordinance is only enforceable for new construction; existing construction is enforced through voluntary requests for inspections to obtain Certificates of Compliance. There are approximately 70-80 properties in the original Ordinance area, mostly residential, where no testing or capping has occurred. This represents a potential health risk. EPA cannot archive the site with so many properties still presenting unknowns. EPA and UDEQ are open to any suggestions for addressing this concern and have no specific proposals.

(3) *Long-term maintenance.* By their very nature, institutional controls and "capping" remedies in active areas will likely have failures. This does not indicate a weakness in administration, but rather a fundamental flaw in institutional controls. In fact, it is obvious to us that Park City has done a very conscientious job of implementing the Ordinance and has placed a great deal of emphasis on its success. However, there are undoubtedly failures of the cap, especially with its shallow depth, and these need to be minimized. We feel this is best accomplished through a long-term program of community education and a review system for correction of failures. Again, there are many options available to meet this need - one important step has already been

taken with improving the real estate disclosure statements. We are open to suggestions and have no particular approach in mind.

6. What specific proposals will EPA and UDEQ be making to the work group regarding their respective future participation with the ordinance?

Consistent with the discussion on "closure," we would like to limit our future involvement as much as appropriate. We have no specific proposals other than a preference for limited future Federal and State involvement. This entire watershed effort is a means to that end. If we are made confident the Ordinance is working and long-term maintenance issues are addressed at a local level, our future involvement may be practically non-existent. If these issues are not addressed, we will leave the site on CERCLIS recognizing that there are some outstanding issues, much as we have to this point. Regardless, we seek some type of agreement or written understanding with Park City so any future requirements are clear.

7. Park City is concerned that the City will incur increased duties and greater regulatory responsibilities as a result of the discussions of the soils work group. Park City is interested in learning what specific funding opportunities are available to assist local municipalities under these circumstances.

There is a very real chance that Park City's duties would expand, though to what degree is unclear. We do not anticipate that major changes to the Ordinance will result from this work, but it is unclear what actions will be necessary. We are already aware that implementation of the Ordinance is a very resource intensive effort for the City and its citizens. We sincerely hope that any future changes will not be particularly resource intensive and that some changes will result in cost or time *savings*, either for the City or for residents.

Superfund was designed for dealing with sites such as Prospector. There are no other regulatory programs we are aware of equipped to handle such a situation. Unfortunately, given the current legal situation, there is no Superfund financial assistance we can offer to City or residents apart from investigation. At any rate, we do not administer local ordinances and it is unlikely we would fund a local ordinance.

However, there may be specific grant opportunities available, such as the EMPACT grant we have discussed, which could assist the City. Also, groups such as the National Association of Local Government Environmental Programs (NALGEP) may be able to help with ideas for addressing environmental issues at the local level. We will assist the City in researching such grants and information.

8. What discretion will EPA grant Park City in organizing the Soils Ordinance Work Group and working with the facilitator?

The City will have a great deal of discretion - this is a unique situation requiring unique solutions. We have asked Park City to lead the soils ordinance work group and are not just providing lip service. We have provided an additional neutral facilitator at no cost to the City to assist in this process. As a whole, this is an issue that most affects Park City and, as such, you are the right organization to lead the process. We will advocate strongly for our concerns and will try to make our bottom-line requirements very clear, but we will make every attempt to understand Park City's concerns and requirements. We feel sure we can all be flexible and open-minded in fashioning workable solutions.

For instance, we have recently discussed how to proceed with the initial start up of the soils ordinance work group. During these discussions, we have made clear our preferences and bottom line requirements, such as citizen participation from the outset, and explained them. We leave it to you to work these issues out, provide leadership and initiative, and establish a process. We will make a good faith effort to make whatever process you choose work for us. If at any time we simply cannot compromise, we will make this very clear. Sometimes our Federal requirements and responsibility are inflexible, but we believe we share the same goals. No matter who is leading the process, we trust we can find a solution that works for the residents, Park City, and the Federal/State regulators. This will require give and take throughout.

Again, we hope these responses provide Park City the comfort and understanding necessary to move forward. EPA and UDEQ staff are available any time to discuss these issues in more detail, but we sincerely hope this is sufficient to allow start up of the soils ordinance work group in earnest. We look forward to meeting this challenge with Park City.

Sincerely,

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